

**UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON**

**DAVID T. GILCHRIST**  
Plaintiff

vs.

**CAPITAL ONE SERVICES, LLC**  
Defendant

Case # **3:14-cv-05020-RJB**  
**3:14-cv-05021-RJB**

Combined Cases

**CIVIL COMPLAINT**

**MEMORANDUM**  
**IN SUPPORT OF**  
**MOTION TO STRIKE IMMATERIAL DOCUMENT**  
**AND REMAND BACK TO STATE COURT**

PLAINTIFF David T. Gilchrist files this memorandum in support of MOTION TO  
STRIKE IMMATERIAL DOCUMENT AND REMAND BACK TO STATE COURT, stating:

**ISSUE**

1. The issue for the court is whether Capital One Services, LLC has complied with

28 U.S.C. § 1446(a) in the removal procedures of the Plaintiff's Small claims in establishing a bases for removal for 15 U.S.C. § 1692 **and** if 47 U.S.C. § 227 was intended for original federal question jurisdiction as "Capital One" implies regarding 28 U.S.C. § 1331 when it cites Mims v. Arrow Fin. Servs.

2. Capital One Services, LLC has not followed proper procedure for removal of Case No. 13 S 282 and Case No. 13 S 286 which were filed in the Small Claims Department of Cowlitz County District Court as mentioned in attorney Steven A. Miller's DECLARATION OF STEVEN A. MILLER IN SUPPORT OF DEFENDANT'S NOTICE OF REMOVAL regarding case number 3:14-cv-05020-RJB and case number 3:14-cv-05021-RJB, which were filed January 9, 2014.

### ARGUMENT

3. In DEFENDANT'S NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. §§ 1331, 1367, 1441, AND 1446, they allege in section II, ¶ A, that "This Court has original jurisdiction over this action pursuant to 28 U.S.C. § 1331. The TCPA, 47 U.S.C. § 227, is a federal law, over which the federal courts have federal question jurisdiction.... In addition, the FDCPA, 15 U.S.C. § 1692-1692P, is federal law, over which the federal courts have federal question jurisdiction.

- 1           4. The removal is based on two facts that are in dispute. First, the only FD CPA claim raised  
2           by Capital One Services, LLC was listed in the Verified Complaint for Relief<sup>1</sup> document  
3           that was never filed by the Plaintiff in the Small Claims Department of Cowlitz County  
4           District Court.
- 5           5. Capital One Services, LLC's removal was mostly based upon an FD CPA claim located in  
6           paragraph ¶¶ 27, 39-41 in a Verified Complaint for Relief by the Plaintiff served on the  
7           defendant's registered agent. However, the Verified Complaint for Relief from the plaintiff  
8           was not filed with the small claims department. The Verified Complaint for Relief was  
9           strictly intended as a communication in "good faith" to let the defendant know what I will  
10          or may argue during verbal arguments at the small claims court hearing. The verified  
11          "complaint" was and is my memorandum to read to the judge at the small claims hearing.  
12          It was not meant to be a proper pleading according to state and federal rules.
- 13          6. A signature for verification is entirely different than the signature for a pleading, especially  
14          concerning a pro se. A pro se must sign two documents in order to have an effective  
15          verified complaint that meets the courts rules. An attorney only needs one because he is  
16          already under the rules of perjury because of his or her position as a court officer.  
17          Regardless if a verification is attached onto a pleading to make one single document, both  
18          the verification and the pleading are entirely different documents and must conform to  
19          court rules in that they both must be signed. The verified "complaint" that the Plaintiff did  
20          not file but sent to the defendant's registered agent in "good faith" does not meet the court  
21          rules of both the state court and federal court for a proper pleading. Thus Rule 11(a) of the

22          <sup>1</sup>See Exhibit A, pages 3-10, DECLARATION OF STEVEN A. MILLER IN SUPPORT OF DEFENDANT'S NOTICE  
OF REMOVAL.

Civil Rules for Courts of Limited Jurisdiction has been violated and the verified

"complaint" document used as evidence in support of a remand to the federal court must be stricken.

7. Rule 11(a) of the Civil Rules for Courts of Limited Jurisdiction and Rule 11(a) of the Federal Rules of Civil Procedure do not permit improper documents to be filed. Federal Rule 11(a) demands that improper documents be stricken. How much more then for a document that is not only unsigned with no address or phone number, but also not even properly filed in the Small Claims District Court?

8. **A document not filed with the court remains outside the jurisdiction of the court.** It is therefore, impossible to remand a document that doesn't exist in the eyes of the court.

9. Courts heavily scrutinize the removal of documents to establish proper jurisdiction. If the removing documents do not strictly comply with court rules then the move is improper,

even if the defect in the removing of the document was a minor or technical defect of little substance.<sup>2</sup>

10. Therefore no FDCPA claim can be made.

11. Second, the TCPA statute 47 USC § 227, if left to itself as a single claim or joined with state statutes, was specifically intended by Congress so that the average citizen could bring a claim into their local small claims court without the need to hire a lawyer or learn the proper procedures for Superior State Court or Federal Court. This is not to say that federal courts have no jurisdiction over the TCPA.<sup>3</sup> The federal courts for the most part have jurisdiction over federal statutes. However, the state court, especially the Small Claims, was specifically targeted as the first court of choice by Congress when creating the TCPA.

**The . . . [Act] contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. . . . [I]t is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. . . .**

**Small claims court or a similar court would allow the consumer to appear before the court without an attorney.** The amount of damages in this legislation is set to be fair to both the consumer *and the telemarketer*. However, ***it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages.*** (Remarks of Sen. Hollings, 137 Cong. Rec. 30821-30822 (1991); emphasis added.)

12. 47 USC § 227, when filed in most Small Claims Department (like Washington State) in the United States is in a court with subject matter jurisdiction.<sup>4</sup>

<sup>2</sup>See Rule 3 and Rule 11a of the Civil Rules for Courts of Limited Jurisdiction and Rule 3 and Rule 11a of the Federal Rules of Civil Procedure.

<sup>3</sup>Mims v. Arrow Fin. Servs. LLC, No. 10-1195 (U.S. Supreme Court Jan. 18, 2012)

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13. Many courts have observed that the Legislative history supports the intent that private  
actions under the TCPA were to "be treated as small claims best resolved in State Courts  
designed to handle them. . ."<sup>5</sup>

14. Though the Supreme Court has ruled that 47 U.S.C. § 227 falls within 28 U. S. C. §1331<sup>6</sup>,  
the court did not state that federal courts were to have exclusive jurisdiction. On the  
contrary, they were only pointing out that 28 U. S. C. §1331 was not voided by Congress  
concerning the statute as it pertains to individuals filing a TCPA claim.. Almost every  
Circuit agrees that state courts are the first and primary jurisdiction for most TCPA claims  
by private individuals. "Congress wisely foresaw that requiring plaintiffs to proceed in  
federal court would create a procedural burden that might cause prospective plaintiffs to  
forego remedial action under § 227 altogether."<sup>7</sup>

15. On the other hand, the TCPA authorizes state attorney generals to bring civil actions on  
behalf of their state's residents to obtain an injunction against such calls and to recover  
monetary damages.<sup>8</sup> The TCPA provides that the federal district courts have "exclusive  
jurisdiction" over actions brought by state attorney generals.<sup>9</sup> It thus appears that the State  
attorney generals and the FCC were intended to address any widespread violations through  
their enforcement powers in federal court – as opposed to personal efforts by individuals in

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<sup>4</sup>47 U.S.C. § 227(b)(3)

<sup>5</sup>See *Murphey v. Lanier*, 204 F.3d 911, 915 (9<sup>th</sup> Cir. 2000); *ErieNet, Inc. V. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Foxhall Realty Law Offices v. Telecomms. Premium Servs., Ltd.*, 156 F3d 432, 438 (2d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F. 3d 1287, 1289, modified, 140 F.3d 898 (11<sup>th</sup> Cir. 1998); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F3d 507, 514 (5<sup>th</sup> Cir. 1997).

<sup>6</sup>*Mims v. Arrow Fin. Servs. LLC*, No. 10-1195 (U.S. Supreme Court Jan. 18, 2012)

<sup>7</sup>*Murphey v. Lanier* 997 F.supp. 1348 (S.D. Cal. 1998)

<sup>8</sup>47 U.S.C. § 227(f)(1)

<sup>9</sup>47 U.S.C. § 227(f)(2)

1 State small claims courts.<sup>10</sup> In fact, § 227(b)(3) is purposeful in its silence of a federal  
2 district court.

3 16. 47 USC § 227 was never intended nor designed so that the average pro se would bring, or  
4 would have their TCPA suits remanded into the federal courts. The TCPA was never  
5 intended to be used by the alleged violators of the law to seize and remand the cases to  
6 Federal Court based on a 28 U.S.C. § 1331 claim, where, at best, federal court would  
7 create a procedural burden that might cause prospective plaintiffs to forego remedial  
8 action, and at worst, pro se litigants would fall prey to the gamesmanship of smoke &  
9 mirrors by crafty lawyers hoping to dodge legitimate claims.

10 17. In fact, just within 6 days of having my two cases remanded to federal court, attorneys from  
11 “Capital One” filed a Tag-Along Action case MDL No. 2416, in which the attorneys for  
12 Capital One Bank (USA), N.A., Capital One Financial Corporation, Capital One Services,  
13 LLC, and Capital One, N.A. are attempting to play “tag-team” with Steven A. Miller of  
14 Graham & Dunn PC in order to strip these TCPA claims away from the control of the Plaintiff  
15 and remove them to the MDL. After which, Graham & Dunn will attempt to “mop up” with a  
16 motion dismissing the poorly alleged FDCPA claim found in the Verified Complaint for Relief  
17 based on Rule 12(b)(6). When faced with this type of sophisticated lawyering, the average pre  
18 se Plaintiff whom Congress had intended to keep companies like “Capital One” in check, is  
19 left in bewilderment not having any clue about what to do. This is an absolute outrage and I  
20 object to the remand and the Tag-Along. This is the gamesmanship of smoke & mirrors by  
21 crafty lawyers hoping to have “Capital One” dodge legitimate claims.

22 <sup>10</sup>See Schulman v. Chase Manhattan Bank (2000) 268 A.D.2d 174, 178, 710 NYS.2d 368, 371.

18. Based upon the Supreme Courts ruling<sup>11</sup> and the overall opinion of the Circuit Courts and Congress regarding the TCPA, a reasonable person would conclude that when an individual files a TCPA claim by itself or with an additional state claim or claims in a court that has subject matter jurisdiction, then that case should remain in that court in which the plaintiff filed and no remand should be considered by any federal district court in which a TCPA claim has been properly filed in a State Court with subject matter jurisdiction.

WHEREFORE, Plaintiff David T. Gilchrist requests this Court to enter an Order striking from the record of this cause the “Verified Complaint for Relief” found in pages 3-10 of Exhibit A in case number 3:14-cv-05020-RJB and case number 3:14-cv-05021-RJB and remand back to the Washington State Small Claims Department of Cowlitz County District Court, Case No. 13 S 282 and Case No. 13 S 286, granting such other and further relief as the Court may deem reasonable and just under the circumstances.

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Plaintiff

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<sup>11</sup>Mims v. Arrow Fin. Servs. LLC, No. 10-1195 (U.S. Supreme Court Jan. 18, 2012)